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Supreme Court, U.S.
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No. 00-1628

IN THE SUPREME COURT OF THE UNITED STATES

JEAN TRIGALET and MYRA TRIGALET,
As personal representatives of the estates of CONSTANCE TRIGALET and MARTHA ANNETTE TRIGALET, and LEONARD MUNSON, as personal representative of the estate of STEVEN LEWIS MUNSON
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipality can be directly liable for violating a citizen's substantive due process rights when the individual officer's conduct did not rise to the level of a substantive due process violation.

II. Whether a municipality may be directly liable for violating a citizen's constitutional rights when the policies, practices, and customs of the municipality were arbitrary, conscience shocking and a proximate cause of the deaths of the petitioner's decedents.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests this Honorable Court deny the writ for certiorari, sought by the Petitioners, seeking review of the decision of the Tenth Circuit Court of Appeals granting judgment to the City of Tulsa.

OPINIONS BELOW

The opinions and orders previously entered in this action are appropriately set out in the Appendix to the Petitioners' petition.

THE PETITION FOR WRIT SHOULD BE DENIED

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause that has been decided by the highest court of last resort before presentation to this Court. Certiorari should only be granted when the case clearly presents a situation indicative of unfair justice and that redress cannot be obtained through ordinary proceedings.

This Court has recognized the limited jurisdiction available by way of certiorari. Only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion of authority between the circuit courts of appeal.

Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, (1923).

The rules of this Court also define the narrow limits of such review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. These rules set forth the circumstances that must exist for a writ of certiorari to be granted.

In the present case, review is sought on the ground that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue." Supreme Court Rule 10 (a). While Petitioners suggest that the case merits review to resolve a conflict among the court of appeals, the conflict identified by the Petitioners is illusory. However, a review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other circuit court of appeals.

I

A MUNICIPALITY CANNOT BE HELD LIABLE FOR VIOLATING A PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN THE OFFICERS WHOSE CONDUCT DIRECTLY CAUSED THE PERSON'S INJURIES DID NOT VIOLATE THE PERSON'S SUBSTANTIVE DUE PROCESS RIGHTS.

Petitioners assert there is a difference between this Court's holding in *City of Canton v. Harris*, 489 U.S. 378 (1989) and *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) regarding whether a municipality can be held liable when an officer whose conduct caused a person's injuries is

found not to have violated the person's constitutional rights. Extant jurisprudence does not support this position.

In *Heller*, issues pertaining to an individual police officer's individual civil rights misconduct were bifurcated for purposes of trial from a concurrent claim that the City of Los Angeles was responsible for the officer's misconduct as a result of its police regulations. A jury was impaneled to determine the officer's liability. The jury determined that the officer had not violated the plaintiff's constitutional rights. Upon that finding, the trial court dismissed the concurrent claim against the City of Los Angeles, concluding that there could be no basis for the City's liability if the individual officer had not violated the plaintiff's constitutional rights. Reversal of this judgment by the Ninth Circuit in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985) prompted a fairly blunt reinstatement of the trial court's decision by this Court:

> [T]his was an action for damages, and neither *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), nor any other of our cases authorize the award of damages against a municipal corporation based upon the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point. *Heller*, 475 U.S. at 499.

In *Canton*, the Court recognized that inadequate training, in and of itself, is not sufficient to impose municipal liability. The Court did embrace the notion that if a concededly valid policy is unconstitutionally applied by a municipal employee, the City is liable if the employee has not been adequately trained and the constitutional wrong has

been caused by that failure to train. Applying this principle, the Court stated at page 391:

> [F]or liability to attach in this circumstance the individual deficiency in a city's training must be closely related to the ultimate injury. Thus, in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.

In *Collins v. City of Harker Heights*, 503 U.S. 115, (1992) the Court reiterated that an underlying constitutional violation must exist to impose liability on a municipality. Therein, the Court's stated, at page 124,

> "We concluded that if a city employee violates another's constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violations."

The Court went on to distinguish its use of the term "deliberate indifference" in Eighth Amendment cases. The Court continued, "that term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents."

The cases are consistent in holding a municipality cannot be held liable when the officers whose conduct directly caused a person's injury did not violate the person's substantive due process rights.

II

THE CIRCUIT COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *HELLER* DOCTRINE THAT MUNICIPAL LIABILITY ONLY EXISTS WHEN THERE HAS BEEN AN UNDERLYING CONSTITUTIONAL VIOLATION.

Petitioners assert there is a wide ranging conflict between the circuits regarding the direct liability of a municipality when a third party is injured but does not suffer a constitutional deprivation. Case law does not support this position.

Every court of appeals decision except *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994) (panel opinion) is in accord with *Heller*. See: *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998); *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Leatherman v. Tarrant County*, 28 F.3d 1388 (5th Cir. 1994); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998); *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Myers v. Oklahoma County Bd. Of Com'rs*, 151 F.3d 1313 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

Petitioners claim "many courts have determined that *Heller* does not preclude consideration of municipal liability even when the individual officers have been exonerated." (Petitioners Brief at page 10). However, none of the cases cited by the Petitioners support this statement. Of seven cases, Petitioners cited only one case, *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), that was decided

after this Court's decision in *Heller*. However, the Tenth Circuit addressed neither *Heller* nor the individual liability issue in *Berry*.

Petitioners contend the Tenth Circuit's reliance on *Heller* was incorrect. The Petitioners reason that *Heller* was a Fourth Amendment case while the present case is brought pursuant to the Fourteenth Amendment. They distinguish the present case because the Tenth Circuit applied the "shocks the conscience" standard to determine the individual officers had not violated petitioners' constitutional rights. Such a differentiation misses the point of *Heller* that whenever an injury is solely attributable to the actions of an officer, a municipality cannot be held liable if it is determined the officer did not commit a constitutional violation.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) this Court distinguished the custodial situation of a prison from that of a police pursuit. In a custodial situation the government deprives an individual of his liberty. In doing so, the government also deprives that person of his ability to care for himself. In those situations, it is possible that the harm that would befall an inmate was not the result of the actions of individual officers. Rather, the harm could result from the decisionmaker's choice. That choice could include lack of sufficient staff to protect the inmates or to have insufficient medical personnel on duty. In those cases it is the conscious choice of the decisionmaker, not the actions of individual officers that caused the harm. Thus, *Heller* would not be applicable.

In a pursuit situation, as in this case, the alleged injury arises from the decision made by individual officer to pursue a particular suspect. Since the injuries would be attributable solely to the decision of the individual officer to pursue, *Heller* would apply. *Barrett v. Orange County Human*

Rights Commission, 194 F.3d 341 (2nd Cir. 1999) is illustrative of this point.

In *Barrett*, the Second Circuit found that liability of the Commission was not inconsistent with a finding the individuals had committed no wrong. The Court noted the Commission was a multi-member board that makes its decisions as a group. The act of termination was an action of the group, not the named individuals. Thus, it was the Commission as a group that terminated Barrett, not the individual members of the Commission. Since the decision to terminate Barrett was not attributable solely to the individuals, *Heller* was not applicable to the situation.

Petitioners place great weight upon *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994). The *Fagan* panel, in a two to one decision, departed from established precedent. That panel stated:

> We decline to follow four other courts of appeals, which have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1499-500 (10th Cir. 1992) (city can be liable if pursuing officers violate Constitution but escape liability because of qualified immunity); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993) (same), cert. denied, --- U.S. ----, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994).

The *Fagan* opinion has been widely criticized and rejected by other circuits.

In *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the Court held that to prevail on a *Monell* claim, the plaintiff had to establish an underlying constitutional violation. The Court acknowledged the *Fagan* decision stating:

> *Fagan* attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of respondeat superior. That cannot be the case since *Monell* expressly holds that there is no cause of action for respondeat superior liability against a municipal corporation under 42 U.S.C. Sec. 1983. *Monell*, 436 U.S. at 694-95, 98 S.Ct. at 2037-38. Thus we choose to follow the clear holding of Heller that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. *Thompson*, 33 F.3d at 860, n. 11.

In *Evans v. Avery*, 100 F.3d 1033, (1st Cir. 1996) the Court stated at page 1039-1040:

> In *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the

> Constitution." *Id.* at 1292. The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policy makers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* *Evan* invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . .
>
> The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. (citations omitted) Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *Evans,* 100 F.3d at 1039-1040.

Another Third Circuit opinion has also criticized the rationale of the *Fagan* opinion. In *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) the appeals court said:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policy makers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong--establishing an underlying constitutional violation. *Mark*, 51 F. 3d at 1153, n. 13.

Petitioners set forth several cases they claim reach the same result as *Fagan*. However, those cases are distinguishable on their facts or have been misinterpreted by the Plaintiffs.

For instance, Plaintiffs rely heavily upon the case of *Chew v. Gates*, 27 F.3rd 1432 (9th Cir. 1994). In *Chew*, the individual officers caused a constitutional violation. In the present case it has been determined that the individual officers did not violate the constitutional rights of the Petitioners.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the plaintiff cited *Chew* for the proposition that a municipality could be held liable under §1983 notwithstanding a finding the individual defendants were found not to have committed a constitutional violation. The Ninth Circuit rejected such an interpretation of those decisions. The *Quintanilla* Court found *Heller* dispositive and plaintiff had to show the individual officers violated his constitutional rights before the municipality could be held liable.

Plaintiffs also cite *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). Citing *Heller*, the *Parrish* Court reiterated that municipal liability could not be imposed upon a finding that plaintiff's constitutional rights were not violated. *Parrish*, 963 F.2d at 207. The jury was required to answer special interrogatories. It made a finding the individual officer had violated the plaintiff's constitutional rights. In light of the jury's finding, the Court held municipal liability was not inconsistent. *Parrish*, 963 F.2d at 207.

The Eighth Circuit later examined *Parrish* in *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Finding the individual officers had not caused a constitutional violation, the *Robinson* Court found the municipality could not be held liable under §1983. The Court went on to say that, "Our recent decision in *Parrish v. Luckie* (citation omitted) is distinguishable because there the jury found that an officer had deprived plaintiff of her constitutional rights." *Robinson*, 972 F.2d at 977, n 3.

In support of their position, Petitioners claim the Eighth Circuit upheld a "verdict exonerating individual defendants but finding municipality liable" in *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) (Pet. Br. at 17). The Court in *Praprotnik*, at page 1173, footnote 3, actually stated:

> *Heller* is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* **Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.** The failure of the jury to

> find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. *Praprotnik*, 798 F.2d 1773, n. 3 (emphasis added).

The Petitioners next cite *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Gibson*, the appeals court reversed and remanded a decision in favor of the City because the plaintiffs did not have an opportunity to conduct discovery. The decision was based on the standards of Rule 12(b)(6). Later, in *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997), the same court, citing *Gibson*, held that finding the individuals had not violated the plaintiff's constitutional rights precluded a finding of liability on the part of the government. The appeals court stated:

> A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim. *Tesch*, 157 F.3d at 477 (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990).

The only other case cited by Petitioners that addresses the same issue is *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986). The Petitioners quoted from page 1233 of *Hewitt*, "The City could . . . be liable under *Monell*. . . even if [the individual officer] was exonerated, as long as [the officer] had in fact acted pursuant to municipal policy or regulation." In so holding, the Ninth Circuit relied upon its decision in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985). The viability of the *Bushey* opinion is doubtful in light of the fact the Supreme Court granted certiorari and vacated that

judgment in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

Petitioner has relied heavily on Eighth Amendment cases in their argument. In such cases the Constitution guarantees certain minimal custodial standards for persons who the government has deprived of their liberty. Such cases are distinguishable from the present case. The courts have been consistent in their application of *Heller* to cases involving allegations of injury directly attributable to the actions of individual officers.

III.

PETITIONERS' ARGUMENT THAT THE CITY IS DIRECTLY LIABLE PURSUANT TO *COLLINS* FOR INDEPENDENTLY VIOLATING THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PETITIONERS' DECEDENTS IGNORES THE FIRST PRONG OF THE COLLINS TEST.

Petitioners rely upon *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992) in support of their second question. The Petitioners state, "if the city's conduct could have been characterized as arbitrary in a constitutional sense or conscience shocking, the plaintiff would have stated a claim of direct municipal liability." (Petitioners' Brief at page 26). This argument is similar to the oft-criticized analysis of *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir. 1994). This analysis ignores the first prong of the *Collins* test – establishing an underlying constitutional violation. *Mark v. Borough of Hatboro*, 51 F.3d at 1153, n. 13.

Petitioners' argument ignores the Court's discussion of *Canton*. *Collins*, 503 U.S. at 123-124. There the Court stated that in *Canton*, "we concluded that if a city employee violates another's constitutional rights, the city may be liable

if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation." Petitioners' argument thus ignores the first prong of the *Collins* test- that the injury be caused by a constitutional violation. See *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996).

Lastly, despite Petitioners' statements to the contrary at page 27 of their petition, at no time has there been a finding that "the policies, practices and customs of Tulsa were arbitrary, conscience shocking and a proximate cause of the deaths of the Petitioners' decedents." In fact, the District Court noted there were disputed issues of fact as to the issue. See Petitioner For Writ of Certiorari, App. C at 38a-39a.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 5, 2001.

Respectfully submitted,

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